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No. 711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, et al., *Petitioners*,

v.

WILSON & CO., INC., et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM ASSOCIATED COMPANIES IN OPPOSITION TO PETITION FOR CERTIORARI

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Jurisdiction

The jurisdictional requirements of the Petition for Writ of Certiorari are set forth in the Petition.[1]

Question Presented

Whether the Court of Appeals, having been assured that adequate records were being maintained and preserved, erred at the time it confirmed a rate order of the Federal Communications Commission pending judicial review, in

[1] However, the Petition for Certiorari is out of time, as shown at pp. 18-19, *infra*.

not deciding issues with respect to the application of prescribed reductions and increases in rates during the period the injunction would be in effect, such refusal to anticipate these issues being without prejudice to their resolution in the event the rate order is sustained on judicial review.

Statement

Attempting to show that "the issue presented in this case is narrow and sharply defined" (Pet., p. 11),[2] the Government limits its Statement (Pet., pp. 3-9) to selected facts which do not adequately state the nature of the proceedings in the Federal Communications Commission and in the Court of Appeals.

The orders of the Federal Communications Commission in its Docket Nos. 11645 and 11646, now under review in the Court of Appeals, prescribe a comprehensive readjustment of the entire rate structure for the private line services under investigation—a variety of telegraph services furnished by the Western Union Telegraph Company and of telephone and telegraph services furnished jointly by the American Telephone and Telegraph Company and Bell System Associated Companies (hereinafter referred to as the telephone companies). The prescribed reductions of some telephone rates with which the Petition for Certiorari is exclusively concerned are but part of the single rate order under review.

The whole premise of the Government's position in this Court is that the Commission's order dealt separately with one set of rates for private line telephone services and another for private line telegraph services (*e.g.*, Pet., p. 5). This is not the case. Rather, the Commission applied a sin-

[2] "Pet." refers to the Petition for Writ of Certiorari herein.

gle method of ratemaking to the various categories of private line services subject to its order, and the result was a single integrated rate structure for private line services as a whole. The Commission rejected the carriers' traditional reliance upon business judgment of market conditions as a factor in pricing particular private line services. Instead, it applied to the private line rates at issue a formula derived from its conclusions as to costs of furnishing the services, including a prescribed rate of return on net investment.

The Commission first determined for each separate category of telephone and telegraph private line service the earnings produced by the current rates, finding that the rates of return of the telephone companies on particular services ranged from 1.6% to 8.2% (Ex. B, p. 30).[3] The Commission then prescribed rates designed to produce the identical 7¼% rate of return for each category of private line service (Ex. B, pp. 23, 31). The Commission's single theory of conforming the various segments of the rate structure to cost plus a fixed rate of return resulted in a comprehensive readjustment of private line rates embracing both increases and decreases in rates (Ex. B, p. 31).

Throughout its investigation, the Commission adhered to the theory that cost should be the primary if not exclusive standard of ratemaking. At the request of the Commission, the telephone companies and Western Union made studies of their respective costs of providing private line services. These studies were introduced in February 1958 (Ex. A, p. 7). In the latter part of the same year, the Commission ordered an interim reduction of telephone rates amounting to approximately $5,700,000 annually and

[3] "Ex." refers to the exhibits to the Joint Petition for Review filed in the Court of Appeals.

also permitted an interim increase in telegraph rates raising the revenues of the telephone companies by $8,370,000 (Ex. A, pp. 7-9).

After the interim rates became effective, the Commission denied a petition by telegraph users for determination of private line telegraph rates "upon a separate record." In its order, released January 29, 1959, the Commission stated (para. 8):

> "Any determination made by the Commission with respect to the lawfulness of private line teletypewriter [telegraph] rates as contemplated by the aforementioned issues of the general investigation, as well as with respect to the 'interim' rates under suspension, obviously involve the consideration of cost data and other evidence going to questions of rate levels and rate structure common to both determinations. This is also true with respect to the determination of just and reasonable rates applicable to AT&T's private line telephone services which involve cost and rate structure considerations which, in large measure, are inseparable from considerations pertinent to the determination of teletypewriter [telegraph] rates. We do not see how it would be realistic or conducive to an expeditious determination of the issues herein to attempt to fragmentize the proceeding in these respects even if it were possible to do so. . . ."

In its Initial Decision the Commission revised the carriers' cost studies as it deemed necessary (Ex. A, pp. 14-92), and made the resulting costs its basis of ratemaking. In paragraphs of its Initial Decision, approved and adopted in its Final Decision (Ex. B, pp. 26, 28), the Commission said (Ex. A, pp. 96, 104):

> "Generally, we believe that the cost of providing service constitutes the most reliable criterion available for determining just, reasonable and non-discriminatory rates. We shall regard costs either as directly

controlling in the fixing of rates herein or as reference points from which to measure the extent of any departures therefrom, based on other ratemaking considerations. Rates which depart from cost indications must be clearly warranted in order to satisfy our statutory standards of lawfulness. Although earnings levels have been stated herein in terms of specific percentages, it should be understood clearly that we are considering the operating results shown by the cost studies as a reasonable and fair approximation of private line costs rather than as mathematically precise."

* * * *

"With these general principles in mind, we shall endeavor to determine rates which: (a) produce reasonable earnings at approximately the same level for A.T.&T.'s private line telephone, telegraph, and telephotograph services; (b) produce earnings for Western Union's private line telegraph service as close to the proper level for that company as possible without burdening the ratepayer with higher rates for complete telegraph service than would otherwise obtain if A.T.&T. were the sole carrier; (c) result in an equitable distribution of the carriers' revenue requirements among the components within each of their respective private line services; and (d) accord maximum recognition to lower costs experienced by each carrier on competitive offerings consistent with the attainment of the foregoing objectives."

In its Final Decision, the Commission reiterated its adherence to the cost-of-service-rate-of-return formula for all private line rates. The Commission stated (Ex. B, p. 21):

"As the Initial Decision at paragraph 146 stated, there is 'no convincing evidence of record warranting any significant difference in the level of earnings for A.T.&T. between its telephone and telegraph grade services.' Although the two carriers present different arguments on the point, the suggestion by both is that a rate structure which yields the same level of earnings

> from private line telephone services as from private line telegraph services would result in an unwarranted shift of use from the telegraph services to the telephone services, and that this consideration warrants some protection of private line telegraph grade services from the competition of private line telephone services. We refuse to accept that view."

It is particularly misleading for the Government to assert that the telephone companies' earnings from private line telephone rates "were found by the Commission to have been 'unreasonably high'. (Ex. A 103.)" (Pet., 5.) In its Final Decision, the Commission expressly disclaimed any finding that the telephone companies' earnings were excessive, with respect either to their entire operation or to their private line services (Exhibit B, p. 24):

> "The Commission regards the level of earnings here employed in its rate prescriptions and authorizations as neither the maximum nor the minimum figures that might be lawfully adopted. We find these levels of earnings to be reasonable for the purposes here employed. That is as much as the Commission's decision in these proceedings requires. We make no findings concerning the reasonable rate of return for either carrier's system operations during the test year period."

Accordingly, there is no basis for any claim that any private line rates are excessive except within the concept of the Commission's single theory of adjusting all private line rates to a common rate of earnings, a theory that produces both reductions and offsetting increases in private line rates.

The Commission anticipated that the new rate structure prescribed in Docket Nos. 11645 and 11646 would increase the revenues of both carriers (Ex. B, p. 31). A reduction of the telephone companies' revenues from telephone serv-

ices of $1,034,000 was to be offset by an increase in revenues of $3,190,000 from telegraph services, for a net increase of $2,156,000.[4] Western Union's revenues from telegraph service were to be increased $822,000. The Government presents figures for December 1962 erroneously implying that the overall effect of the Commission's rate prescriptions would be a reduction in the telephone companies' revenues (Pet., p. 5).[5] The Commission anticipated

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[4] The Government gives figures of $1.6 million for the anticipated decrease in the telephone companies' revenue from telephone services and $2.7 million for the anticipated increase from telegraph services (Pet., p. 5). These figures are from a table in the Initial Decision superseded in the Final Decision (Exhibit B, p. 31), and erroneously omit telephotograph services.

Contrary to the statement of the Government (Pet., p. 3 note), the Commission prescribed rates for telephotograph and the other types of private line services referred to by the Government as being in issue in the Commission proceedings, so that all are subject to the interlocutory injunction issued by the Court of Appeals.

[5] The Government's reference to "some 4,500 telephone customers" paying rates that the Commission order would reduce (Pet., p. 11) is erroneous. The figure of some 4,500 customers includes both telephone and telegraph customers. See Affidavit of Francis J. Woods, dated July 26, 1963, attached to the telephone companies' Answer to Petitioners' Motion for Temporary Stay and to Petitioners' Application for Interlocutory Injunction.

The claim that "telephone customers" are paying rates that exceed the prescribed rates by more than $5,000,000 per year (Pet., p. 11) is apparently based upon an affidavit, attached to the Government's Supplemental Brief in the court below, indicating that, based upon December 1962 volume of business, the Commission's order would produce an annual reduction of $5,200,000 for telephone services, an increase of $600,000 for telephoto services and an increase of $3,000,000 for telegraph services. These estimates are subject to changes in the volume and mix of the telephone companies' private line business since December 1962. Moreover, all of these figures are net figures reflecting the overall effect of wholesale adjustments, upward and downward, of all private line rates, which

that carrier revenues would be increased. In fact, because of changes since the Commission proceedings in volume and mix of private line service furnished by the telephone companies, the present net effect of the Commission's rate structure would be that, to a substantial extent, increases in charges would offset decreases in charges.[6]

The Commission's adjustment of rates for the various categories of private line services to a strict cost-of-service rate-of-return standard would produce a great variety of changes, both increases and decreases, in private line rates. Although there would be net reductions in rates for "telephone grade services" as a whole (Ex. B, p. 39, col. (6)), the rates for some "telephone grade services," notably telephotograph services and some short-haul services, would be increased (Ex. A, p. 126; Ex. B, p. 42; Ex. B, p. 39, col. (5)). Thus some customers for telephone grade services would pay net increases, and many would receive net reductions. And, although there would be increases in rates for "telegraph grade services" as a whole (Ex. B, p. 40, col. (9)), the rates for some "telegraph grade services" would be reduced. For example, the existing "monthly rate per mile for continuous service" for the first 250 miles would be reduced from $1.45 (Ex. A, p. 126) to $1.10 (Ex. B, p. 42).

Both the increases and reductions in private line rates would result from the new rate structure prescribed by the

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produce aggregate gross revenues of well over $100,000,000 annually. Each figure includes both increases and reductions in the rates paid by individual customers.

[6] Affidavit of Francis J. Woods, dated July 26, 1963, attached to the telephone companies' Answer to Petitioners' Motion for Temporary Stay and to Petitioners' Application for Interlocutory Injunction.

Commission in a single order based on a single theory of ratemaking. This single order was before the Court of Appeals when it granted a temporary stay and an interlocutory injunction. Both the increases and the decreases would require consideration should this Court grant certiorari to review that interlocutory injunction. Thus, the issue in this case is not so "narrow and sharply defined" as the Government would have it (Pet., p. 11). The Government shows no justification for selecting prescribed reductions in telephone rates for its special attention and ignoring all other reductions and increases prescribed by the Commission.

There is no substance in the Government's statement that telephone rates "had not been challenged in the petition for review," or that "telegraph rates . . . alone were in issue" in the court below (Pet., pp. 8, 10). In fact, the Joint Petition for Review expressly attacks the Commission's cost theory which underlies the prescription of all private line rates (Petition for Review, pp. 9-10). As the petitioning meat packers stated in the court below, the grounds of their action "challenge the validity of the F.C.C. orders in their entirety" (Reply to Motions for Modification of Temporary Stay, dated August 12, 1963, p. 2).

Finally, the Government erroneously states that a duty to make refunds should be imposed upon AT&T "as a condition of granting it [AT&T] equitable relief" (Pet., p. 10). At no time did the telephone companies apply to the Court of Appeals for stay or injunction of the administrative orders under review. The petition for review was filed in the Court of Appeals by three users of private line services. In their Answer to the Motion for Temporary Stay and the Application for Interlocutory Injunction filed by the petitioning users in the court below, the telephone companies asked that both the stay and the injunction be de-

nied. The telephone companies did not object to the Commission's order going into effect at once. The telephone companies did show, in the alternative, that if any injunction were entered, the equities of this case, in which the Commission prescribed simultaneous reductions and increases in rates, require that the injunction apply to the orders under review in their entirety. The alternative approach was adopted by the Court of Appeals. The Government is not contending in this Court that an interlocutory injunction should not have been issued by the Court of Appeals, and the Government expressly states that it does not contend that "it was an abuse of discretion to hold the telephone rates in abeyance pending the outcome of the appeal" (Pet., p. 16).

REASONS FOR DENYING THE WRIT

I.

The Petition Seeks Premature and Unnecessary Review By This Court.

A. The Court Of Appeals Properly Deferred Decision Of Issues Respecting Restitution.

The reasoning of the Government's argument runs as follows:

> The private line telephone rates now in effect are "presumptively excessive" (Pet., p. 17);
>
> Telephone rate payers are entitled to refunds if the Commission's order is upheld upon judicial review (Pet., pp. 11-14); and,
>
> In the absence of appropriate records, there is grave danger that refunds will not be feasible (Pet., pp. 13, 17).

The question whether any of the present private line telephone rates are excessive, together with the question whether other private line telephone rates and telegraph rates are unduly low, depends upon the validity of the Commission's single theory of making all such rates in relation to cost of service plus a fixed rate of return, without regard to value of service, including customer impact, and other factors normally entering into the determination of rates for particular services. This is one of the issues being litigated in the Court of Appeals.

The question whether telephone ratepayers should receive refunds for the period in which the interlocutory injunction is in effect is not the isolated issue the Government represents it to be. If the Commission's order is sustained on the merits, the equitable issue of restitution would involve a great deal more than the reductions in telephone rates discussed by the Government in its Petition. In addition to reductions in some telephone rates, the Commission ordered increases in other telephone rates, reductions in some telegraph rates, and increases in other telegraph rates. All of these increases and reductions have been held in abeyance by the interlocutory injunction; all must be taken into account in the event the consideration of restitution becomes necessary.

So-called "protective conditions" like those the Government seeks are entirely inequitable. Such "protective conditions," limited to users of private line telephone services whose rates would have been reduced by the Commission's orders, would afford no protection to any users of private line telegraph services (some of whose rates were reduced) and, most significantly, would not take into account at all the recoupment of the simultaneous increases in rates prescribed by the Commission in the same order and on the same theory of ratemaking. By improperly severing

the integrated rate structure prescribed by the Commission. The "protective conditions" sought by the Government would commit the telephone companies to bear rate reductions without any provision for the complementary rate increases prescribed in the same order under the same theory.

The equitable issues arising from the stay of an administrative order prescribing both reductions and offsetting increases in rates are very different from the issues presented in the cases relied upon by the Government. In those cases (Pet., pp. 12, 14), the utilities' right to certain revenues was determined in the litigation. In the instant case, the Commission has readjusted rate relationships without substantially changing the overall revenues of the telephone companies. Some rate payers are resisting rate increases, while the benefits of rate reductions are sought on behalf of others. The telephone companies are essentially in the role of stakeholders. The equities of this situation are very different from those in a case in which a utility opposing its customers seeks and obtains a stay of a rate reduction order. Here, for all practical purposes, the contest with respect to rates for the period in which the injunction was in effect will, if the Commission's order is sustained, be between the private line users whose rates were reduced and those whose rates were increased by the Commission's order: any contention that the utility should bear the reduced rates without receiving the increased rates prescribed simultaneously in a single order based on a single theory of ratemaking would be manifestly inequitable.

Because the equitable issues that would arise in the event the Commission's order is sustained are substantial and novel, the Government's request that such issues be resolved summarily, without briefing and oral argument (Pet., pp. 17-18), is entirely unjustified.

More fundamentally, however, there is no occasion for review in this Court at this time of the equitable issues that might arise if the Commission's order is sustained. The Court of Appeals did not decide the equitable issues which the Government asks this Court to resolve. The Court of Appeals has done nothing to prejudice the raising of any claim by any party if and when the Commission's order is sustained.

The several cases the Government cites (Pet., pp. 11-12) do not support its argument that the Court of Appeals abused its discretion by failing to "condition" the interlocutory injunction as the Government requested. None of the cited cases holds that a court that grants an interlocutory injunction must simultaneously rule on restitution. On the contrary, in one of the cases cited, *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781 (1929), the Court held that *after* judicial review of an administrative order was completed, the lower court then had the power and the duty to rule on issues of restitution (279 U.S. at 786-787).

Under the circumstances of this case, the Court of Appeals' refusal to rule on restitution issues at the time it granted the interlocutory injunction was entirely appropriate. Under the Government's own argument, these issues arise only if the rates ordered by the Commission are not set aside on judicial review (Pet., p. 12). And, in such event, determination of the equitable issues will be facilitated by the fuller understanding of the nature and effect of the Commission's order gained in the consideration of that order on judicial review.

B. Since Adequate Records Are Being Kept, There Is No Threat To Any Rights Of Rate Payers.

The sole ground asserted by the Government for action by this Court at this stage of the proceeding is not that

there is any need for resolving the equitable issues at this time, but that there is need for preserving the efficacy of a possible restitution order (Pet., pp. 12-13):

> "From these principles and decisions it plainly follows that if the lower telephone rates ordered by the Commission are ultimately upheld (or left unaffected) by the Seventh Circuit's decision on the merits, the telephone customers will at that time be entitled to an order requiring restitution of the excessive amounts collected under color of the injunction. Moreover, since the court of appeals would be obligated to order restitution at the close of the case, it was equally under a duty to preserve the efficacy of that remedy by attaching protective conditions at the time of issuing the injunction."

With respect to the critical question of future "efficacy" of any restitution order, the Government's entire Petition to this Court turns on the claimed absence of assurance that adequate records will be maintained during the period of the litigation. The conclusion of the Petition illustrates this dependence upon the "record-keeping" point (Pet., p. 17):

> "This is a case in which relief must be expeditious if it is to be meaningful. So long as the injunction contains no record-keeping requirements, there is a likelihood that refunds will not be feasible even if the court of appeals should ultimately order them."

Similarly, in the body of the argument, the sole reason for action by this Court at this time turns on the claim that "we have no assurance that the records currently maintained by AT&T will enable it to compute retroactively the billing it would have made had the Commission's order not been stayed" (Pet., p. 13).

Thus, the whole argument for action by this Court at this time is based upon the need for "assurance" that

the telephone companies will maintain adequate records during the period of the litigation.

The fact is that the telephone companies have been keeping adequate records throughout the proceedings in the Court of Appeals, they are now doing so, and they will continue to do so. The telephone companies stated in the Court of Appeals,[7] and they state again in this Court, that they have maintained and will continue to maintain and preserve billing records for all users of private line services affected by the Commission's order. These billing records are adequate to permit a computation for each customer of the differences between the charges paid while the Commission's order is enjoined and charges that would have been paid during the same period had that order not been enjoined.

The telephone companies' representation that adequate records are being maintained and preserved was never challenged in the court below by the Government or by anyone else. Furthermore, after the Petition for Certiorari was filed, the Government in effect abandoned its claim respecting record-keeping in this Court. As noted in the Petition (p. 18), the Government applied for "an appropriate injunctive order from the Circuit Justice pending the action of this Court." The application was for a mandatory injunction "requiring AT&T to maintain records." On January 6, 1964, the telephone companies filed a stipulation in the Court of Appeals wherein they gave further and formal assurance that

> "records will be maintained and preserved which will permit a computation, retroactive to August 1, 1963,

[7] Response of AT&T et al. in opposition to Motion for Order Requiring the Filing of a Bond and Accounting, dated August 26, 1963 (attached hereto as Appendix A), pp. 21, 29, *infra*.

> of the difference between the rates and charges on which the bills for Bell System interstate private line services subject to the above orders of the Commission have been based and the rates and charges which would have been in effect but for the stay and injunction ordered by [the Court of Appeals]".[8]

By letter of January 10, 1964, addressed to the Clerk of this Court, the Solicitor General withdrew the Government's application for injunction, as follows:

> "In the light of formal commitments received from American Telephone and Telegraph Company and associated companies in their reply to the government's application for a writ of injunction, it is requested that this application be withdrawn."

Since adequate records are being maintained and preserved, any rights of ratepayers are fully preserved. If the Commission's order under review is sustained on the merits, the Court of Appeals may then turn to issues of restitution. Because complete records necessary to computation of any restitution that may be decreed will be available, there is no occasion whatever for a grant of certiorari by this Court at this time.

For the foregoing reasons, there is no basis in fact for the Government's request for action by this Court at

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[8] A copy of this formal assurance, which is part of the certified record in this Court, is attached hereto as Appendix B, p. 31, *infra*.

Because the Court of Appeals has not yet ruled on any issue respecting restitution and the Government is premature in requesting that this Court provide for possible refunds to a selected class of private line customers, the telephone companies' preservation of records is without prejudice to any position on the questions whether refunds should be made to customers whose rates would have been reduced by the Commission's order and whether additional payments should be made by customers whose rates were increased by that order.

this time. The refusal of the Court of Appeals to anticipate equitable issues that might arise at a later stage of the proceeding was entirely correct and without prejudice to any party in light of the assurance that adequate records are being maintained by the telephone companies.

II.

Error By The Court Of Appeals, Even If Shown, Would Not Warrant Review By This Court.

It should be noted further that even if the Court of Appeals erred, a showing of error at the interlocutory stage of a proceeding in a lower court does not alone warrant action by this Court. In *United States* v. *Beatty*, 232 U.S. 463, 468 (1914), the Court stated:

> "Interlocutory rulings not infrequently become of no importance by reason of the final result or of intervening matters, and that may be true here. But if the decision ultimately operates prejudiciously to the United States, it can be reviewed and, if need be, corrected. . . ."

Cf. American Construction Co. v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893), where the Court said it should not "review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

No such extraordinary reasons for review in this Court are present at this stage of the instant proceeding, even if the Court of Appeals had erred in any of its rulings (as it has not).

III.

The Petition Is Out Of Time.

The Petition asks this Court for "expeditious" relief (Pet., p. 17). The Government itself has been anything but expeditious. The Government first presented its request that the telephone companies be ordered to keep records on August 16, 1963, by moving in the Court of Appeals that the telephone companies be required to file with the Court special monthly accounting reports.[9] The motion was denied. The Government repeated the request for special monthly accounting reports in the argument below with respect to the interlocutory injunction; that request was rejected by the Court of Appeals in its order dated September 27, 1963, and by the court, sitting *en banc*, in its order dated November 12, 1963, denying rehearing. After waiting three months from the issuance of the interlocutory injunction, and on the forty-fifth day from the denial of the petition for rehearing *en banc*, the Government filed its Petition for Certiorari on December 27, 1963. The case has progressed in the court below to the stage at which the petitioning users have filed a brief on the merits together with five volumes of printed record as an appendix, and the briefs of respondents will be due as soon as the court below sets a date in response to the Government's motion for extension of the January 22, 1964, due date (which the telephone companies were prepared to meet).

[9] Preparation and filing of special monthly reports, as contrasted with preservation of the billing records, would have imposed a wholly unnecessary burden on the telephone companies. The Government has abandoned any such request in this Court.

Of greater significance with respect to the jurisdiction of this Court, the Government's Petition for Certiorari is out of time. The Petition was filed December 27, 1963, forty-five days after denial of the petition for rehearing *en banc*, but ninety-one days after the entry of the interlocutory injunction to which the Petition is directed. The applicable statute provides (5 U.S.C. § 1040):

> "An order granting or denying an interlocutory injunction under Section 9(b) of this Act shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in Title 28, United States Code, Section 1254(1): *Provided*, that application therefor be duly made within forty-five days after the entry of such order."

The usual rule that the time for application for appellate review is tolled by a petition for rehearing should not apply where review is sought of an interlocutory order such as the one at issue here, because the rationale of that rule is inapplicable. A petition for rehearing tolls the time to apply for review because it deprives the judgment "of that finality which is essential to appealability." *Leishman* v. *Associated Wholesale Electric Co.*, 318 U.S. 203, 205 (1943); cf. *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942). But no such finality is "essential" where an interlocutory order is made appealable by statute.

Accordingly, the Government had "forty-five days after the entry" of the interlocutory injunction within which to file its Petition. The interlocutory injunction was entered on September 27, 1963. The Petition for Certiorari was filed on December 27, 1963, long after the forty-five day period prescribed by statute had expired.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied. If the Petition is granted, the Government's request for summary disposition should be denied, so that this case may be heard on briefs and argument.

Respectfully submitted,

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Appendix A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

WILSON & CO., INC., SWIFT & COMPANY, and ARMOUR AND COMPANY, Petitioners, vs. FEDERAL COMMUNICATIONS COMMISSION, et al., Respondents.	No. 14269 Petition for Review of Orders of an Administrative Agency.

RESPONSE OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM ASSOCIATED COMPANIES IN OPPOSITION TO THE MOTION OF THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION FOR AN ORDER REQUIRING THE FILING OF A BOND AND ACCOUNTING

THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY and BELL SYSTEM ASSOCIATED COMPANIES (hereinafter referred to as the telephone companies) hereby oppose the motion of the United States and the Federal Communications Commission (hereinafter referred to as the Government) "for an order requiring the filing of a bond and accounting by the American Telephone and Telegraph Company and Bell System Associated Companies," on the following grounds:

Statement

This case was initiated by three users of private line services furnished by the Western Union Telegraph Co.

and by the telephone companies. The Joint Petition for Review herein challenges the orders of the Federal Communications Commission in FCC Dockets Nos. 11645 and 11646, wherein the Commission prescribed a comprehensive rate structure, effective August 1, 1963, for all private line services at issue in those dockets—a variety of telegraph services furnished by Western Union and of telephone and telegraph services furnished by the telephone companies.

In a Motion for Temporary Stay filed with their petition, petitioners requested relief only insofar as the FCC orders under review prescribed rates for private line services "furnished petitioners." This Court, however, by order of July 31, 1963, issued a temporary stay applying generally to the orders under review and suspending their operation in their entirety.

On August 5, 1963, the Government filed an "emergency motion" requesting that the temporary stay be modified so as to apply "only to those portions of the Commission's orders in Dockets Nos. 11645 and 11646 which deal with private line telegraph services." This Court, declining to except rates for private line telephone services from the stay, denied the "emergency motion" by order of August 13, 1963.

The telephone companies filed an answer to petitioners' Motion for Temporary Stay and a response in opposition to the Government's "emergency motion." At no time have the telephone companies applied to the Court for a stay of the orders under review. Rather, they have showed that in the circumstances of this case only a complete stay or no stay at all can be appropriate. For a partial stay of the orders under review would dismember a single integrated rate structure, create and compound discrimination and

preference, and inflict severe and needless injury upon the telephone companies.

Now the Government, in the pending motion filed six days after denial of its "emergency motion," requests an order by this Court requiring the telephone companies (1) to post a $1,000,000 bond, wherein they would (2) "agree" to render to the Court special monthly accounting reports showing "in detail" all amounts received after August 1, 1963, from users of private line telephone services "by reason of the Court's order of July 31, 1963," and (3) "agree," in the event the FCC orders before this Court are not set aside, to make refunds, with interest, to users of private line telephone services paying rates that would have been reduced August 1, 1963, but for the temporary stay issued by this Court. (Motion, pp. 1-2.) As shown below, the pending motion is in essence a renewal of the Government's "emergency motion." For this and other reasons, it should be denied.

1. The Government's Motion Is Predicated Upon An Erroneous And Inequitable Double Standard

The bond that the Government would have this Court order the telephone companies to file would represent far more than "the principal amount of $1,000,000" and "accurate accounts in detail." In the bond requested the telephone companies would be compelled to "agree" to "refund to the users of private line services, other than telegraph grade services, any portion of the revenues collected by virtue of the Stay which are in excess of the rates for such services prescribed by the Commission's orders to be effective from August 1, 1963, in the event that the Commission's orders prescribing rates for such services are not set aside by this Court" (Motion, p. 2).

The proposed bond would provide special accounting and refunds for only part of the private lines rates prescribed in the FCC orders under review. The terms of the bond would limit it to telephone grade services (those "other than telegraph grade services"), and it would cover only those rates as to which the Commission prescribed a reduction. In seeking such a bond, the Government repeats the erroneous insistence upon the separability of the rate structure prescribed by the FCC for private line services that was the primary ground of the "emergency motion" denied by the order of this Court dated August 13, 1963. The integral and inseparable nature of that rate structure—based on a single theory of rate-making applied to the rates for all private line services—is shown in the telephone companies' response, dated August 12, 1963, to the Government's "emergency motion." To avoid repetition, that response is incorporated herein by reference.*

The Government's pending motion is even more extreme. It would not only separate telephone from telegraph services, but even within the telephone grade services, the motion would have the Court treat rates that would be reduced by orders of the FCC differently from rates that would be increased. The Government concedes that there are some "private line telephone grade rates . . . where increased rates were prescribed" (Motion, p. 4), but the motion is directed only to those telephone rates that would be reduced (Motion, p. 2).

The Commission prescribed a great variety of changes, both increases and decreases, in private line telephone

* A substantial portion of the Government's motion is essentially a reply to the telephone companies' response date August 12, 1963 (Motion, pp. 6-8). Since this reply material is not pertinent to the pending motion, no response is made here to the numerous misleading statements it contains.

rates.* The Government seeks to sever the rate prescription in such a way that, if the Commission orders are not set aside by the Court, the telephone companies would be committed in advance to pay refunds to all users of private line telephone services who would have received reductions in rates. (Incongruously, the Government would not require refunds to those users of private line telegraph services whose rates would have been reduced.)

But what about the increases in rates? If resettlements, secured by bonds, are to be required, such a provision is also appropriate for petitioners and other users of private line telegraph and telephone services who would be paying increased private line rates but for the stay issued by this Court. The practical fact is that the FCC prescribed both increases and reductions in rates. If, as the Government argues, there should be resettlements to the prescribed basis retroactive to August 1, 1963, resettlements could not be a one way street. If the telephone companies are obliged to refund to reduced rate levels, petitioners and many other users should be equally obliged to pay increased rates retroactive to the same date.

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* Although there would be net reductions in rates for "telephone grade services" as a whole (Exhibit B, p. 39, col. (6)), the rates for some "telephone grade services," notably telephotograph services and some short-haul services, would be increased (Exhibit A, p. 126; Exhibit B, p. 39, col. (5); Exhibit B, p. 42). Thus some customers for telephone grade services would pay net increases and some would receive net reductions.

And, although there would be increases in rates for "telegraph grade services" as a whole (Exhibit B, p. 40, col. (9)), the rates for some "telegraph grade services" would be reduced. For example, the existing "monthly rate per mile for continuous service" for the first 250 miles would be reduced from $1.45 (Exhibit A, p. 126) to $1.10 (Exhibit B, p. 42).

The Government claims that the telephone companies should be required to post bond wherein they agree to make refunds with respect to telephone rates reduced by the Commission's orders. The theory of this claim applies equally to petitioners and other users of private line services (over 4,500 in number) with respect to rates increased by the Commission orders. If the Government's motion is sound and reasonable, it is equally sound and reasonable to enter a companion order adding users of private line services as parties hereto and directing them to post adequate bond wherein they agree, in the event the FCC orders under review are sustained, to pay the difference between rates kept in effect by the stay of July 31, 1963, and rates as increased by the Commission orders.

It is clear that all the increases and decreases in rates for all types of private line services prescribed by the FCC form a single rate structure, not susceptible of division. The Government's renewed effort to create a double standard is clearly inequitable and its motion should be denied as based upon the same false premise as its "emergency motion" denied by the order of this Court dated August 13, 1963.

2. The Grounds Advanced By The Government In Support Of Its Motion Are Erroneous

In support of its "refund" theory, the Government makes a number of erroneous statements regarding the scope and effect of this Court's review of the rate structure the FCC prescribed for private line services. It is said, for example, that if the FCC's orders are sustained "the end result when the stay expires may be that the telephone rates prescribed in the tariffs filed by AT&T, to be effective August 1, 1963, were the lawful rates for this period." On this basis, the Government envisions suits by users

of private line telephone services "to recover the excess collected by AT&T after August 1, 1963." (Motion, p. 8.)

In fact, the changes in rates filed by the telephone companies "to be effective August 1, 1963," have not become effective and cannot become effective until such time as the stay of the orders that required them may be vacated by this Court. All such changes in rates, for private line services of all types, were filed because the FCC so ordered, and all were filed specifically as "changes in regulations and rates made in compliance with the decisions and orders of the Federal Communications Commission . . . in Dockets No. 11645 and No. 11646." (Affidavit of Francis J. Woods, attached to Answer of AT&T et al. dated July 29, 1963, pp. 1-2.) When the underlying FCC orders which produced changes in rates are stayed, those changes in rates are also stayed, and the old rates remain the lawfully effective rates.

The cases cited by the Government (Motion, pp. 9-10) are not remotely in point. These cases arose where a utility, in resisting a general rate reduction, petitioned the Court for a stay, and the stay was conditioned on an agreement by the petitioner to refund to the prescribed basis if the order was upheld. The Government's motion adopts the terminology of the stays entered in that type of case, such stays being conditioned upon certain undertakings and agreements of the utility (Motion, pp. 2, 9-10). Indeed, the Government states that its request is "patterned after an order entered . . . by the Eighth Circuit" in such a case (Motion, p. 10).*

* The case is *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F.2d 690 (8th Cir. 1953), cert. denied, 346 U.S. 922. The stay order to which the Government refers (not discussed in the report of the case) was entered in proceedings in which the petition of the Kansas Commission was consolidated

The whole theory of the Government's motion is that conditions should be placed upon the telephone companies because it is equitable for AT&T to agree to assume certain burdens which the Government claims will arise from "the stay order it [AT&T] requested" (Motion, p. 9). The Government's argument misconceives the facts of this case. The telephone companies did not institute this Court action, and did not seek a stay nor make undertakings or "agreements" as a condition of obtaining a stay. Petitioners, three users of private line services whose rates would have been increased, asked for the stay. When a stay was requested "as to petitioners," the telephone companies pointed out that a stay in such a form would compound the discrimination as between users of private line services, requested petitioners' motion for stay be denied and, in the alternative, moved that if the FCC's orders are stayed at all, they be stayed in their entirety. (Answer of AT&T et al. dated July 29, 1963, pp. 1-2.)

This is not a case in which the utility's position is adversary to that of the consuming public. Because the FCC's orders prescribed substantially offsetting increases and reductions in rates, the net effect upon the using public as a whole is not substantial. The effect of the FCC's orders would be a redistribution of the rates as between various classes of customers. For the same reasons, the effect on the telephone companies' revenues would be substantially offsetting if the FCC's orders became effective.

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with petitions for review of Federal Power Commission orders filed by Northern Natural Gas Company. The order of the Eighth Circuit used as the pattern in the Government's motion was specifically issued "upon the petition of Northern Natural Gas Company" (order dated December 18, 1952, in cases Nos. 14704, 14708, 14733, p. 1). The Kansas Commission supported the higher rates, in the interest of Kansas gas producers. (206 F.2d at 698.)

And, of course, a stay of the orders in their entirety does not affect the telephone companies' revenues. It is only when petitioners, initially, and thereafter the Government, seek to stay the orders in part, or require refunds as to part of the rate structure, that the telephone companies would be severely and needlessly injured.

Apart from the unfairness of the Government's attempt to require refunds for that portion of the FCC's orders which reduce private line telephone rates, the Government's request for bond, and for special monthly accounting reports for each of thousands of customers would impose a wholly unnecessary burden. Even if the Government's other premises were sound (and they are not), there is no basis for requiring the telephone companies, financially sound as they are, to file a bond as security. Nor is there any basis for burdening the telephone companies with the preparation of special accounting reports, sworn to and filed monthly as to each such user of private line services. There is no problem here of preserving records because the telephone companies will of course maintain billing records for all of the users affected by the FCC's orders.

The Government's suggestion that expeditious action in its motion for bond and accounting would assist the Commission in "separate but related" cases (Motion, pp. 10-11), is incomprehensible. Early decision by this Court of the merits of this case might aid the Commission in its disposition of other cases, but it is not credible that any action by this Court, expeditious or otherwise, on a motion for bond and accounting in this case would provide any assistance to the Commission in dealing with any other case.

Conclusion

Once again, the issue before the Court is whether certain rates can properly be isolated from the private line rate structure prescribed by the FCC and treated separately. Once again, the only sound conclusion is that they cannot. The Government's pending motion should be denied as was its "emergency motion."

WHEREFORE, the AMERICAN TELEPHONE AND TELEGRAPH COMPANY and BELL SYSTEM ASSOCIATED COMPANIES pray that the Motion of the United States of America and the Federal Communications Commission for an Order requiring the filing of a Bond and Accounting be denied.

Respectfully submitted,

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Dated: August 26, 1963.

Appendix B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

WILSON & CO., INC., SWIFT & COMPANY, and ARMOUR AND COMPANY, Petitioners, vs. FEDERAL COMMUNICATIONS COMMISSION, et al., Respondents.	No. 14269 Petition for Review of Orders of an Administrative Agency.

STIPULATION

It is hereby stipulated that, during the pendency of this proceeding for review of the orders of the Federal Communications Commission in its Dockets Nos. 11645 and 11646, records will be maintained and preserved which will permit a computation, retroactive to August 1, 1963, of the difference between the rates and charges on which the bills for Bell System interstate private line services subject to the above orders of the Commission have been based and the rates and charges which would have been in effect but for the stay and injunction ordered by this Court. These records are being maintained and preserved, and this stipulation filed, without prejudice to any position which may be taken on questions of whether or not refunds should be made to customers whose rates would have been reduced by the Commission's orders or additional payments should

be made by customers whose rates would have been increased by the Commission's orders.

Stipulated this 3rd day of January, 1964.

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